FEB 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,

Appellant,

V.

STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLEE

WILLIAM S. LEE
District Attorney
Dougherty County
Courthouse
Albany, Georgia 31701

TONY H. HIGHT
Executive Director
District Attorneys
Association of Georgia
Suite 406, 501 Pulliam St.
Atlanta, Georgia 30312
Attorneys for Appellee

INDEX

	Page
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
ARGUMENT	4
I. WHETHER OR NOT "CARNAL KNOWLEDGE" IS OBSCENE WAS NOT RAISED BELOW	4
II. APPELLANT DID NOT RAISE THE BROAD ISSUE BELOW AS TO WHETHER GEORGIA CODE ANN. §26-2105 IS UNCONSTITUTIONAL ON ITS FACE OR THE DUE PROCESS ISSUE	5
III. (a) THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, WHERE THE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT *NATIONAL* COMMUNITY STANDARDS SHOULD APPLY	20
(b) THE TRIAL COURT PROPERLY CHARGED THE JURY IN THIS CASE	24

INDEX (Continued)

Page

IV. THE SIMPLICITY OF THE TRADITIONAL JURY SYSTEM SHOULD BE UTILIZED RATHER THAN COMPLEX APPELLATE REVIEW IN EVERY CASE 26

CONCLUSION 31

CERTIFICATE OF SERVICE 31

INDEX OF CITATIONS

Court Cases:

American Communications Asso. v. Douds, 339 U.S. 352 (1949) 13

Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) 12,19

Cohen v. California, 403 U.S. 15 (1971) 13

Evans Theatre Corp. v. Slaton, 227 Ga. 377 (1971) 12

Feldschneider v. State, 127 Ga. App. 745 (1972) 21,23

Gable v. Jenkins, 309 F. Supp. 998 (N. D. Ga. 1969), *affirmed*, 397 U.S. 592 (1970) 11,15

Ginzburg v. U. S., 383 U.S. 463 (1966) 26

Gornto v. McDougall, 336 F.Supp. 1372 (S. D. Ga. 1972) 11,28

INDEX OF CITATIONS (Continued)

	Page
Gornto v. State, 227 Ga. 46 (1970)	11
Hawkins v. State, 124 Ga. App. 53 (1971)	12
Jacobellis v. Ohio, 378 U.S. 184 (1964)	21,23,28
Jenkins v. State, 230 Ga. 726 (1973)	5,14,22
Kimbrell v. State, 57 Ga. App. 172 (1938)	21
McKinney v. State, 121 Ga. App. 815 (1970)	25
Miller v. California, ____ U.S. ____, 37 L.Ed.2d 419 (1973)	15,29
Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875)	6,26
Paris Adult Theatre I v. Slaton, ____ U.S. ____, 37 L.Ed.2d 446 (1973)	7
Piercy v. State, 92 Ga. App. 599 (1955)	12
Roth v. U. S., 354 U.S. 476 (1957)	15,16,21
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	18
Simmons v. State, 226 Ga. 401 (1970)	25
Slater v. Dodd, 108 Ga. App. 879 (1964)	25
Slaton v. Paris Adult Theatre I, 228 Ga. 343 (1971)	7
Southeastern Promotions, Ltd. v. City of Atlanta, Ga., 334 F.Supp. 634 (N. D. Ga. 1971)	13
Spurlin v. State, 228 Ga. 2 (1971)	7

INDEX OF CITATIONS (Continued)

	Page
Stanley v. Georgia, 394 U.S. 557 (1969)	7
Touchton v. Echols County, 211 Ga. 85 (1954)	6
U. S. v. A Motion Picture Film, 404 F.2d 196 (2nd Cir. 1968)	29
U. S. v. Groner, 479 F.2d 577 (5th Cir. 1973)	23
U. S. ex rel Huguley v. Martin, 325 F.Supp. 489 (N. D. Ga. 1971)	12
Young v. State, 226 Ga. 553 (1970)	25

Statutes:

Georgia Code Ann.:

§26-2011	6,7,11,12,13,14,25
Chapter 26-21	14,26
§26-2101	6,11,12,14,20,22,26
§26-2105	4,6,10,11,12,13,14,16,18,20,25
§26-6301	11
§102-102	14
28 USC §1257(2)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,

Appellant,

V.

STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

Jurisdiction is doubted upon the ground that the issues do not present a substantial federal question, and on the ground that the judgment rests on an adequate non-federal basis.

The Georgia statutory scheme for prohibiting obscenity was authoritatively construed by the trial court in its instructions to the jury, and by the Georgia Supreme Court, in the decision below. It was construed as a matter of state law, and, as so construed, was constitutional under numerous prior holdings of this Court. Because the trial court correctly construed

the statutory proceedings in its instructions to the jury, Appellant was not denied the due process of law. In point of fact, he was granted more rights under the Georgia law than he would have been granted under an equivalent federal prosecution.

QUESTIONS PRESENTED

Appellee cannot agree with the Appellant's statement of the questions presented to this Court by this appeal for the simple reason that Appellant fails to consider the issues in fact appealed to and decided by the Georgia Supreme Court, fails to note that other issues were expressly abandoned, and fails to note that every issue raised was "ab initio". The Appellee would restate the questions presented by this appeal as follows:

I. **WHERE THE APPELLANT CONCEDED THE ISSUE IN STATE COURT AND FAILED TO RAISE AN ISSUE ON *WHETHER OR NOT THE FILM "CARNAL KNOWLEDGE" IS OBSCENE*, MAY THE ISSUE BE RAISED "AB INITIO" BEFORE THIS COURT.**

II. **WHETHER THE APPELLANT IS CONFINED TO THE BREADTH OF ISSUES RAISED BEFORE THE GEORGIA SUPREME COURT IN HIS CONSTITUTIONAL ATTACK ON GEORGIA CODE ANN. §26-2105, RATHER THAN ISSUES RAISED "AB INITIO."**

III. **WHERE THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE**

STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, *WHERE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT "NATIONAL COMMUNITY STANDARDS" SHOULD APPLY*, MAY THE APPELLANT RAISE THE ISSUE *WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO EMPLOY "LOCAL" AS DISTINGUISHED FROM STATEWIDE STANDARDS "AB INITIO."*

IV. WHETHER A "DUE PROCESS" ISSUE MAY BE RAISED FOR THE FIRST TIME "AB INITIO."

V. WHETHER THE SIMPLICITY OF THE TRADITIONAL JURY SYSTEM SHOULD BE UTILIZED RATHER THAN COMPLEX APPELLATE REVIEW IN EVERY CASE.

STATEMENT OF FACTS

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, exhibited the motion picture "Carnal Knowledge" on January 13, 1972. The film was seized pursuant to a search warrant (JA 6), and Appellant was arrested for the offense of Distributing Obscene Materials. Robert W. Reynolds, District Attorney, Dougherty Judicial Circuit, returned an accusation to Superior Court charging Appellant with the offense of Distributing Obscene Materials. Trial was held on March 22 and 23, 1972. The jury, after viewing the film, hearing evidence introduced on behalf of the defendant, *none involving evidence supporting "Carnal Knowledge" as a serious literary work*, and being

properly instructed, returned a general verdict of guilty. On appeal to the Georgia Supreme Court, Appellant's conviction was affirmed; the Georgia statutory scheme for the prohibition of obscenity was authoritatively construed; and the trial court's instructions to the jury were ruled correct.

Under Georgia's evidenciary rules, the unsworn statement of the Appellant did not establish the following as probative evidence contrary to Appellant's brief:

"Carnal Knowledge" is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971 (JA 24, 59). Actress Ann-Margret received an Academy Award nomination for her performance (JA 24). The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia (JA 24, 59). (Appellant's Brief pp. 5, 6)

Contrary to Appellant's contentions, the following issues were *not* raised below:

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, JA 46-51). (Appellant's Brief p. 9)

ARGUMENT

I.

WHETHER OR NOT "CARNAL KNOWLEDGE" IS OBSCENE WAS NOT RAISED BELOW.

The Appellant finally contends that this Court should determine "whether the film 'Carnal Knowledge' is obscene." He urges that this Court should reverse the finding of facts by the jury below, that "Carnal Knowledge" is obscene under the Georgia test of obscenity.

A cursory review of the record below shows this issue was conceded and not raised below. Not one of Appellant's forty-three enumerations below questioned this point, and Appellant failed to argue this point in his brief below. For this reason, the Georgia Supreme Court did not reach or decide this question. It decided only "that the evidence in this record amply supports the verdict of guilty." *Jenkins v. State*, 230 Ga. at 728. Since Appellant failed to raise this question below in a proper and timely manner, and because Appellant is attempting to raise this question for the first time in this Court, this Court should not reach or decide the issue.

If the Court should reach this issue, the issue should be decided upon the evidence available to the jury and of probative value.

II.

APPELLANT DID NOT RAISE THE BROAD ISSUE BELOW AS TO WHETHER GEORGIA CODE ANN. §26-2105 IS UNCONSTITUTIONAL ON ITS FACE OR THE DUE PROCESS ISSUE BELOW.

The Appellant did not raise any such issues below. Appellee has included the grounds so raised in the following materials:

Appellant is contending, in effect, that he raised, in a proper and timely manner, in the court below, a

broad question regarding the constitutionality of the Georgia statutes herein under attack, *i.e.*, *Georgia Code Ann.* §§26-2011 and 26-2105, *and* that the Georgia Supreme Court, as a basis for its decision, held that the statute did not violate the federal law.

Assuming, without conceding, that Appellant did raise, in a proper and timely manner, such a question, it did not constitute a basis for the decision appealed from. The Georgia Supreme Court resolved the questions concerning Code sections 26-2011 and 26-2105 by simple statutory construction consistent with prior (Georgia) case law. Appellant contended, at page 7 of his brief to the court below, that the "question raised is whether the Statute [*i.e.*, §26-2105] is constitutional under the First Amendment . . . for failure to include as an essential element of the purported crime . . ." the language of Code section 26-2101(b). The Georgia Supreme Court ruled, as a matter of state law, "that sections of the code which relate to the same subject matter shall be construed together. *See, Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81)." Under the authority of *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), since the decision below on that point is supported by an adequate state ground, this Court should not accept jurisdiction.

Appellant further contended to the court below, that an issue presented was:

> Does the accusation, and the statute upon which it is based, . . . construed in connection with . . . the definition of the word "knowingly" violate the First Amendment . . . by depriving defendants of First Amendment freedom of ex-

> pression in burdening defendant with self-censorship?

Nowhere in Appellant's brief in the court below is this point argued, although it is referred to tangentially in connection with another issue. Under existing Georgia law, *Spurlin v. State*, 228 Ga. 2, 6 (5) (1971), Appellant is deemed to have abandoned this issue in the court below, which explains fully why the Georgia Supreme Court failed to even mention, much less to decide, the question. (See express waiver also. Appellant's Brief below p. 9)

Appellant's final constitutional attack on the two Georgia statutes may be found at page 8 of his brief to the court below.

> Enactment of Section 26-2011 . . . forbidding certain acts in a public place is obviously legitimate as respects the First Amendment. It is equally obvious that it is constitutionally forbidden under the First Amendment to render the same conduct a crime in a non-public place, that is, a motion picture.

The basis for Appellant's argument here is that a motion picture shown in a "non-public" place, *e.g.*, a theatre, to a willing audience, is protected under this Court's ruling in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, that question had previously been disposed of adversely to Appellant's position by the Georgia Supreme Court in *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (1971). That latter decision was affirmed by this Court in *Paris Adult Theatre I v. Slaton*, _____ U.S. _____, 93 S.Ct. _____, 37 L.Ed.2d 446 (1973), where it was stated that the exhibition of obscene material

in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theatre cannot be equated with a private home; nor is there here a privacy right arising from a special relationship; nor can the privacy of the home be equated with a "zone" of privacy that follows a consumer of obscene materials wherever he goes. Thus, Appellant's final constitutional attack cannot support this Court's jurisdiction because not only had the argument been expressly foreclosed by an authoritative decision of this Court so as to leave no room for real controversy, but the decision rested on an independent and adequate state ground, albeit a case affirmed by this Court.

Not one of Appellant's three "constitutional" arguments can be a basis for this Court's acceptance of jurisdiction under 28 U.S.C. §1257(2). As is pointed out above, Appellant abandoned one constitutional argument below; one argument was decided on the basis of prior Georgia case law as a matter of statutory construction; and one argument has been authoritatively decided against Appellant's position by a prior decision of this Court, in *Paris Adult Theatre I v. Slaton*, *supra*. Therefore, this Court should reject jurisdiction of this case because there was no decision below upholding the constitutionality of the statutes in question.

Furthermore, Appellant did not raise, in a proper and timely manner, any question concerning the constitutionality of these statutes. The second "constitutional" question mentioned above was abandoned below, and thus cannot be deemed to have been raised, much less decided, by the court below. The first "con-

stitutional" question mentioned above did not attack the constitutionality of the statute. Instead, it attacked the accusation on the basis that it did not include an essential element of the crime of distributing obscene material to wit: the test of obscenity. It was this question which the Georgia Supreme Court decided adverse to Appellant's position on the basis of statutory construction. The final "constitutional" question allegedly raised below was not proper because it had been authoritatively decided by the Georgia Supreme Court previously, adverse to Appellant's position. It was for this reason that the court below did not even decide the question. No other "constitutional" question was raised by Appellant in attacking the statutes in question.

However, even if this Court believes that Appellant did raise, in a proper and timely manner, any one of the constitutional questions presented *and* even if this Court believes that any one of these questions served as the basis for the decision below, no substantial federal question is raised by Appellant's first two contentions.

The statute under which Appellant was convicted is constitutional on its face, as applied, and as construed and the Appellant was not denied due process of law. Appellant's first two "questions presented" are treated jointly because they essentially raise the same point. He argues to this Court, in effect, that the statute under which he was tried and convicted is unconstitutional on its face, as applied, and as construed, and that the use of this unconstitutional statute as a basis for his conviction denies him the due process of law guaranteed under the Fourteenth

Amendment. Thus, if this Court chooses to reach and decide the issue of the constitutionality of *Georgia Code Ann.* §26-2105, a resolution of that issue will dispose of both of these points raised by Appellant in this Court. It is to this question that Appellee will now speak, although it does not abandon its contention that this Court should not reach this issue, but should dismiss the appeal.

Appellant contends that *Georgia Code Ann.* §26-2105, under which he was convicted of distributing obscene materials, is unconstitutional on its face, as applied, and as construed by the Georgia Supreme Court. He further contends that the utilization of this section to convict him in the trial court below denied him the due process of law. His basic argument here is that the statutory scheme under which he was convicted is vague and overbroad.

"Vagueness of a criminal law rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. If the scope of the power given to officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the subjective views of these officials as to the propriety of the conduct, the statute is unconstitutional as a denial of due process. . . . The concept of overbreadth of criminal laws rests on principles of substantive due process which forbid the prohibition of certain individual freedoms, the principal issue not being reasonable notice or adequate standards, though such issues may be involved, but whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by

the Constitution." *Gable v. Jenkins*, 309 F.Supp. 998, 1000 (N. D. Ga. 1969), *affirmed* 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970).

Judge Morgan, in *Gable*, went on to hold *Georgia Code Ann.* §26-2101 (b) and (c) constitutional, in face of an attack on the ground that it was vague and overbroad. ". . . Section 26-2101 . . . does but two things—it prohibits the distribution of obscene materials and defines what is meant by the term 'obscene materials'. In defining this term, the statute carefully utilizes the definition of obscene materials as that term has been elucidated by the United States Supreme Court. . . . This new code section, 26-2101, is simply a more limited version of the former Georgia law, §26-6301, and has a stronger constitutional base than the former Georgia statute." *Id. See, Gornto v. State*, 227 Ga. 46 (1970).

Appellant contends that *Georgia Code Ann.* §26-2105 "imposes an absolute prohibition against exhibition of motion pictures which portray any of the acts enumerated in *Georgia Code Ann.* §26-2011. . . . This *per se* prohibition operates 'across the board,' totally without regard to whether films portraying such acts are obscene. . . . On its face, §26-2105 therefore makes no attempt to 'distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material.' " (Jurisdictional Statement, p. 11). As the Georgia Supreme Court comprehended Appellant's argument, it was that §26-2105 and the accusation were defective "in that it fails to include the definition of obscene materials as defined in *Georgia Code Ann.* §26-2101(b)." Appellant misstates the impact of *Georgia Code Ann.*

§26-2105. Basically, that section prohibits, inter alia, obscene movies in which acts which, if done live, would constitute public indecency under *Georgia Code Ann.* §26-2011. In defining acts which constitute public indecency, this latter statute utilizes the word "lewd." Save for an act of sexual intercourse, for the designated acts to constitute public indecency, they must be performed in a "lewd" manner. Thus, for §26-2105 to prohibit a movie, the acts in that movie must be "lewd" acts. The use of the word "lewd" does not make a statute unconstitutionally vague. *U.S. ex rel. Huguley v. Martin*, 325 F.Supp. 489 (N. D. Ga. 1971). In *Piercy v. State*, 92 Ga. App. 599 (1955), the Georgia Court of Appeals held that "the offense of lewdness was an indecency referable especially to sexual matters, and it included any gross indecency which was sufficiently open and notorious as to tend to corrupt the morals of the community." 92 Ga. App. at 600. Webster defines the "Obscene" as that which is "offensive to chastity or modesty." *Hawkins v. State*, 124 Ga. App. 53, 54 (1971). Lewd acts, as defined by these Georgia decisions, certainly are synonymous with obscene acts, under §26-2101(b). "There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 381 (1971). In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1941), this Court stated, "There are certain well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the *lewd*

and obscene . . ." (emphasis added). Thus even this Court has equated the lewd with the obscene.

Appellant contends that *Cohen v. California*, 403 U.S. 15 (1971) makes it clear that "public indecency" or "indecent exposure" laws may not be applied to motion pictures and other forms of expression. *Cohen* is inapposite. It involved the prohibition of "pure speech," not "communicative conduct," as is involved here. The former has always been given the highest degree of protection available under the First Amendment. Appellant also contends that *Southeastern Promotions, Ltd. v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N. D. Ga. 1971) supports his position. Nowhere in that case does the Court even suggest that *Georgia Code Ann.* §26-2011 could not constitutionally be applied to the stage play "Hair." The Court does point out that the "foul words and nudity," where emphasizing a theatrical theme, are not lewd; mere nudity is not lewd. But here, the jury found that the conduct displayed was more than mere nudity—it was "lewd" nudity. "Lewd nudity" is a far cry from "mere nudity."

However, assuming, without conceding, that *Georgia Code Ann.* §26-2105 is, on its face, unconstitutionally overbroad, as Appellant contends, the limiting construction placed on the statute by the Georgia Supreme Court avoids any taint of *per se* invalidity. It has long been held by this Court to be within the power of a court to construe a statute narrowly in order to avoid the danger of unconstitutionality if this may be done in consonance with the legislative purpose of the statute. *See, American Communications Asso. v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94

L.Ed. 925, *rehearing denied*, 339 U.S. 990, 70 S.Ct. 1017, 94 L.Ed. 1391 (1949). The Georgia Supreme Court placed a very restrictive interpretation upon §26-2105. They pointed out that because *Georgia Code Ch.* 26-21 begins with the definition of obscenity in §26-2101(b) and (c), §26-2105, "which is merely a part of that chapter, must be read in accordance with the entire chapter. This court has held that sections of the Code which relate to the same subject matter shall be construed together." *Jenkins v. State*, 230 Ga. at 727. Thus, they read §26-2101 (b) and(c) into all of the code sections dealing with the control of obscenity. The title to that chapter of the *Georgia Code*, of which §26-2105 is a part, is "Distributing *Obscene* Materials" (emphasis added). Section 26-2101 defines obscenity generally, and §§26-2102 through 26-2105 proscribe and punish specific acts dealing with material which is obscene under §26-2101 (b) and (c). Even the Committee Notes which are appended to that chapter of the *Code*, and which generally express the intent of the General Assembly in enacting the chapter, state that its purpose "is to punish the distribution or exhibition of obscene materials no matter who is the disseminator or exhibitor. Thus, any medium of distribution or exhibition is covered by this section." In interpreting this chapter, the Georgia courts were bound to consider this statement of purpose. *See, Georgia Code Ann.* §102-102(a) ("In all interpretations, the courts shall look diligently for the intention of the General Assembly, keeping in view, at all times, the old law, the evil, and the remedy.") Thus, even if it is found that a motion picture exhibits conduct which violates §26-2011, the

exhibition of that motion picture cannot be prohibited unless it is also found to be obscene.

The Georgia test of obscenity has been held constitutional by this Court when it affirmed, *per curiam*, the three-judge district court decision in *Gable v. Jenkins*, *supra*. And while *Miller v. California*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 419 (1973), adopts a test which allegedly is more restrictive of First Amendment rights, the Georgia law, until changed by the General Assembly, a possibility feared by some of the *amici*, under which Appellant was convicted was, and still remains, the *Roth-Memoirs* test. The Georgia Supreme Court, in the opinion below, acknowledged that the Georgia test was more restrictive on obscenity prosecutions. Although the states cannot grant an individual less than the constitutionally required minimum of rights, the states may grant an individual more rights, unless preempted by the federal government.

Appellant, by enumerating the "possible" interpretations which could be given to Georgia's statutory scheme, is seeking to count the number of angels which could stand on the head of a pin. The Georgia Supreme Court gave this statutory scheme, including §26-2105, the obvious, common sense meaning intended by the General Assembly. The constitutional requirement is that an individual should have fair and reasonable notice of the offense, and this scheme certainly gives fair and reasonable notice that distribution of obscene material, by whatever medium, is that which is prohibited. In *Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 304, 1 L.Ed.2d 1498 (1957), this Court stated, with regard to a question of the constitutional-

ity of the federal obscenity statute which made punishable the mailing of material that is "*obscene, lewd,* lascivious, or filthy . . . or other publication of an indecent character," (emphasis added)

> "lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards', all that is required is that the language 'conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . These words [in the statute] applied according to the proper standards for judging obscenity . . . give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . .' " 354 U.S. at 491, 1 L.Ed.2d at 1511.

Under this standard, *Georgia Code Ann.* §26-2105, as construed by the Georgia Supreme Court, meets constitutional muster, and a conviction thereunder poses no substantial federal question.

Appellant also contends that even if the Georgia statutory scheme, as construed by the Georgia Supreme Court, meets constitutional muster, it cannot, as so construed, support a conviction seventeen months prior to this authoritative decision, because allegedly "[i]t would have taken 'extraordinary clairvoyance' for Appellant to have guessed . . . that the clear language of §26-2105 'really' meant what the Supreme Court of Georgia was destined to hold it means . . ." (Jurisdictional Statement, p. 19). However, the trial judge showed no "extraordinary clairvoyance," but good common sense, in correctly defining the crime with which Appellant was charged.

The instructions to the jury by the trial judge were ruled correct by the Georgia Supreme Court. After stating to the jury the statutes involved in Georgia's statutory scheme (T. 65-67), the judge correctly synthesized those statutes into the offense of Distributing Obscene Materials, with which Appellant was charged.

> "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as to take the movie outside of the protection of the person involved." (T. 67-68).

This is basically the common sense interpretation of the statutory scheme which the Georgia Supreme Court adopted. The question put to the jury was not simply whether or not the movie portrayed certain conduct which, if done live, would have constituted public indecency; but instead, the question was *if the movie portrayed this conduct, was the movie thereby obscene?* Quite obviously, the jury, in answering this question in the affirmative through their verdict, adopted the same common sense reading of the statutory scheme on which they were instructed and on which the Georgia Supreme Court upheld the conviction. Had Appellant actually read the statutes, and given them this same common sense reading which they demand, he would have arrived at the obvious conclusion that they prohibit obscene material such as is here involved, to wit: the movie "Carnal Knowledge." Furthermore, the Georgia Supreme Court's opinion, when read in light of the instructions which

it was upholding, was not "somewhat ambiguous," as Appellant alleges, but was crystal clear.

Appellant cites *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) to support his argument that the later construction, by the Georgia Supreme Court, of *Georgia Code Ann.* §26-2105, which sufficiently limited the operation of the statute so as to make it constitutional, cannot suffice "to restore constitutional validity to a conviction" that occurred more than a year earlier under the statute "as it was written." *Shuttlesworth* involved a Birmingham licensing ordinance which constituted a prior restraint for the "public welfare, peace, safety, health, decency, good order, morals or convenience," on the free exercise of protected methods of expression, *e.g.*, picketing and parading, without narrow, objective, and definite standards to guide the licensing authority. It is factually distinguishable. The holding in *Shuttlesworth* was based on two points: (1) an ordinance such as the one there involved, which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will an of official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. Prior to the ruling in *Shuttlesworth*, this Court had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." 394 U.S. at 153. (2) Despite a subsequent limiting construction of the ordinance by the Alabama Supreme Court four years after the conviction, which construction this Court assumed

would result in the ordinance passing constitutional muster, the facts of the case showed that the ordinance was read and applied exactly as it was written, which resulted in an unfair, discriminatory and arbitrary decision by the licensing authority. After emphasizing these two points, this Court reversed *Shuttlesworth's* conviction. However, this case presents no basis for reversing Appellant's conviction. Unlike picketing and parading, the "lewd and obscene" are not forms of expression protected by the First Amendment. *Chaplinsky v. New Hampshire, supra.* Here there was no prior restraint placed upon Appellant's activity. Here, the District Attorney who brought the accusation against Appellant was not vested with unbridled discretion to act based on criteria unrelated to the proper regulation of the evil at which the legislation was aimed. He had to prove to a jury of Appellant's peers beyond a reasonable doubt that Appellant exhibited a motion picture, to wit: "Carnal Knowledge," which contained scenes showing (a) an act of sexual intercourse, (b) a *lewd* exposure of the sexual organs, (c) a *lewd* appearance in a state of partial or complete nudity, and (d) a *lewd* caress or indecent fondling of another person. Furthermore, he had to prove beyond a reasonable doubt that this movie was obscene, under the existing test for obscenity in Georgia. Here, the statutory scheme was narrowly construed and correctly interpreted by the trial judge in his instructions to the jury which convicted Appellant; and, as so construed and interpreted, this statutory scheme meets constitutional muster. The Georgia Supreme Court merely

adopted and explained the construction and interpretation of the trial judge.

Thus, Appellant was not denied the due process of law because the statutory scheme under which he was convicted for distributing obscene materials, §26-2105, *et. al.*, was constitutional, as construed, prior to his conviction.

III.(a)

THE ONLY ISSUE RAISED AND DECIDED REGARDING THE APPLICABLE STANDARD WAS IN REFERENCE TO THE CHARGE OF THE TRIAL COURT, WHERE THE APPELLANT CONTENDED THAT THE TRIAL COURT SHOULD HAVE CHARGED THAT *NATIONAL* COMMUNITY STANDARDS SHOULD APPLY.

Appellant contends that one question presented to this Court is

> III. Whether it is constitutionally permissible to employ "local," as opposed to statewide, contemporary community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material. (Jurisdictional Statement, p. 4).

This issue is presented here for the first time by Appellant, since it was never raised in a proper and timely manner below. This issue should not, for this reason, be considered by this Court.

The given charge was couched strictly in the language of *Georgia Code Ann.* §26-2101(b):

> Material is obscene if considered as a whole, applying community standards, its predominant appeal is to the prurient interest, . . . and utterly without redeeming social value, and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. (T. 66).

Under Georgia law, a charge based on the language of the applicable statute is always proper. *See, Kimbrell v. State*, 57 Ga. App. 172 (1938). Clearly, under Georgia law, this charge was not erroneous.

In his Enumeration of Errors to the Georgia Supreme Court, the Appellant raised the narrow issue that the trial court erred in failing to charge that a "national" standard should be applied by the jury. He contended that the court also erred in refusing to give six separate requested charges, all of which dealt with the scope of the contemporary community, which Appellant argued was "national" and not "local." He contended that in the charge the trial court gave, the jury was left with "the clear and strong understanding that community standards will be limited to Albany and Dougherty County, Georgia, alone, and removing from the consideration of the jury the test of obscenity as applied to community standards, in the nation as a whole. . . ." Appellant contends that *Roth, Jacobellis*, and *Feldschneider v. State, infra*, dictates the use of "national" standards as opposed to "local" standards. However, as will be pointed out below, these cases are distinguishable on this point.

The court below did not determine that "local," as opposed to statewide, standards should be applied in Georgia, because that question simply was not raised.

It did determine that *Miller* "held that juries can consider *State or local* community standards in lieu of 'national' standards . . ." *Jenkins v. State*, *supra* at 728 (emphasis added). Long-standing Georgia law and federal constitutional requirements are now congruent, and because the decision below was based on independent and adequate state law grounds, which were constitutional at the time of Appellant's conviction, no substantial federal question is presented.

However, in response to Appellant's contention that it is constitutionally impermissible to employ "local" as opposed to "national," contemporary community standards in evaluating the prurient interest appeal and the patent offensiveness of allegedly obscene material, under *Georgia Code Ann.* §26-2101(b), Appellee urges that the existing constitutional law, as enunciated in *Miller*, is the first definitive ruling by this Court on the extent of the "contemporary community," and that ruling, consistent with Georgia law, is entirely proper and is controlling on this point. The fact that this Court upheld the determination of the trial court in *Miller* that the jury was to apply contemporary community standards of the State of California does not constitute a sufficient basis for requiring a decision on any such issue in the instant case. In responding to Appellant's contention, Appellee does not abandon its contention that this point was not raised below and thus should not be decided by this Court.

The question has, since *Roth*, been, what is the scope of the "contemporary community"? This Court "has not enunciated a national standard test in any

majority opinion and no combination of members . . . making up a majority have indicated approval of such a standard." *U.S. v. Groner*, 479 F. 2d 577, 582 (5th Cir. 1973). There has been no statement in any majority opinion in this Court as to the geographical scope of the term "community." Id. at 581. In *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964), two Justices, Brennan and Goldberg, deemed community standards to mean a nationwide or national test; the community was to be "society at large" or the "people in general." The Chief Justice, joined by Justice Clark, disagreed arguing that community meant local community standards. *Id.* For this reason, the decision of the Georgia Court of Appeals in *Feldschneider v. State*, 127 Ga. App. 745, 748 (1972) cannot represent the true state of the Georgia law, and was overruled *sub silentio*, by the decision below.

The controlling standard in Georgia at the time of Appellant's conviction was enunciated in *Gornto v. State*, *supra*, at 48: "the standard to be applied is not what may or may not have been held to be obscene in other jurisdictions, but what is acceptable in the local community. The jurors represented the average members of their own community and as triers of fact, were charged with the responsibility of making such determination guided by the evidence presented and by their individual and collective awareness of the standards and norms of their community." The Fifth Circuit has also adopted the definition of "community." *U.S. v. Groner*, *supra* at p. 583: "For the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the

jury is drawn and selected. . . . It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common conscience of the community, or the present-day standards of the community if the word 'community' is to include all of the people within the boundaries of this vast nation . . ." Thus, contrary to Appellant's argument on this point, the definition of "the geographic parameters and nature of the 'local' community" was crystal clear when Appellant committed the act for which he was convicted.

Furthermore, the local standard adopted by Georgia, comports with this Court's ruling in *Miller*. "To require a state to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." When this Court's language is considered in light of the background surrounding this debate, the veil over its meaning becomes transparent.

III.(b)
THE TRIAL COURT PROPERLY CHARGED THE JURY IN THIS CASE.

Although Appellant does not raise in this Court a question regarding the charge of the trial court, thirty-eight of his forty-three enumerations of error to the Georgia Supreme Court questioned the trial judge's charges or his failure to give certain requested charges. These were the questions properly and timely raised by Appellant below, and these were questions considered and decided by the Court below.

The Georgia test of obscenity is the *Roth-Memoirs* test, enunciated by this Court and accepted as the definitive word until the *Miller* decision. The Georgia Supreme Court, in the decision below, ruled that the trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. Regarding the test of obscenity, the trial court charged substantially the law contained in the requested charges. The failure to give a requested charge in the exact language of the request where the substance of the request is in fact charged is not grounds for a new trial. *See, Simmons v. State*, 226 Ga. 401, 402 (1970); *Young v. State*, 226 Ga. 553 (5) (1970); *McKinney v. State*, 121 Ga. App. 815 (3) (1970). In addition, a great majority of the requested charges on obscenity are taken directly from the language of the appellate courts. The Georgia courts have frequently held that language may be appropriate for the appellate courts while not appropriate for a charge to the jury. *See, Slater v. Dodd*, 108 Ga. App. 879, 880 (1964).

The trial judge correctly instructed the jury in the necessary interplay of the statutes involved in the statutory scheme prohibiting the distribution of obscene materials. It is clear that when a Code section incorporates a reference to another Code section, as is involved here, i.e., *Georgia Code Ann.* §§26-2105 and 26-2011, it is entirely proper, and even necessary, to charge on both code sections. For this reason, the trial court was entirely proper in charging the law of public indecency under Code §26-2011. Clearly, this charge was not only correct, but was indeed necessary so that the jury might completely understand the

statutory scheme which the defendant was charged with violating. The question which the trial court put to the jury, as was pointed out previously, was essentially that which the Georgia Supreme Court ruled proper: *If the material portrayed conduct which, if done in a public place, would have constituted public indecency, was the movie thereby obscene under the Georgia test of obscenity?*

Finally, the trial court gave an accurate and proper charge in reference to the distribution of obscene materials. This was not a charge on pandering, under *Ginzburg v. U.S.*, 383 U.S. 463 (1966), but was instead taken from *Georgia Code Ann.* §26-2101(c), and was construed by the Georgia Supreme Court to be read into the other sections of *Georgia Code Ch.* 26-21 as a definition of obscenity. It deals essentially with an added dimension that can be used in making a determination as to what constitutes obscene material.

Each question presented below which raised an issue regarding the charge of the trial court was either expressly or impliedly resolved by the court below on a non-federal basis. The decision rested on statutory construction, an adequate and independent state ground. *Murdock v. Memphis, supra.* The statutory construction is conceded to be constitutional by the Appellant, and it is binding on this Court. It presents no substantial federal question.

IV.

THE SIMPLICITY OF THE TRADITIONAL JURY SYSTEM SHOULD BE UTILIZED RATHER THAN COMPLEX APPELLATE REVIEW IN EVERY CASE.

In *Miller*, the numerous States saw the glimmer of hope in solving the hodge-podge of years of struggling to reach some order in the prosecution of obscenity cases. The Court seemed to be eliminating the non-workable inventive ideas of attorneys seeking to create a structure rather than solve the problems.

The Court in *Miller* approved the jury as the trier of fact under proper instructions. Clearly, the simplicity of the workable "reasonable man" concept in Torts and malice aforethough in the crime of murder and other similar concepts, demonstrated necessity of utilizing the traditional jury system rather than a complex appellate review in every case.

The *Miller* decision is dispositive of this issue, even if this Court decides that the question should be considered. The intent of this Court, as enunciated in *Miller*, is clear: This Court will not reverse the jury's decision on the facts—and the question raised by Appellant is one, purely and simply, of fact—except in the case of an issue of overriding national import. Any other decision by this Court, such as is urged by the Appellant, says that the trial by jury, traditionally considered to be a basic constitutional requirement in criminal prosecutions, becomes a superfluous, formal waste of the time and money of the involved parties. Furthermore, acceptance of Appellant's position by this Court is clearly an adoption by this Court of the role of final review board for all of the several thousand new and potentially questionable films released each year. Appellee urges that this Court summarily dismiss this question because it was never raised below. Unless this Court does so, Appellant's final ques-

tion should be rephrased as follows: Can any jury, properly and constitutionally instructed upon the test of obscenity, applying contemporary community standards, *ever* determine that "Carnal Knowledge" is obscene? Appellee would suggest that this has always been the role of the jury, in all cases, and that this Court never meant to suggest that this role should be anything but that attributed to the jury. To his question Appellee will now turn, but without conceding or abandoning its contention that this Court should not even reach, much less decide, the issue.

In First Amendment cases, it is settled that an appellate court must make an independent constitutional judgment on the facts and the quantum of proof of the case in order to insure that if the material is constitutionally protected, vital First Amendment rights are not discarded. *Jacobellis v. Ohio*, 378 U.S. at 190, 12 L.Ed.2d at 799. But what is the extent of this review? In the habeas corpus proceedings which followed the affirmance of the *Gornto* case, *Gornto v. McDougall*, 336 F.Supp. 1372 (S. D. Ga. 1972), Chief Judge Lawrence stated:

> "Yet everything up to that point [i.e., the consideration, on application for certiorari, by this Court of the *Gornto* case] is but idle show, a spinning of judicial wheels. All that has been accomplished so far is to make a record in the trial court upon which the federal courts will on habeas corpus application render a *de novo*, apodictic judgment as to obscenity and First Amendment protection. And when I say federal courts I mean three separate levels of the judiciary— . . . each deciding for itself, according to its own light the matter of obscenity *vel non*.

> "There is a wonderlandish, Oz-like quality about the whole thing. The function of federal courts in these cases is a bewildering anomaly. Do they review the trial court record and determine whether or not the publication is obscene as a matter of law? Or do they determine such as a matter of fact and as though they were jurors? Does the verdict of a state jury finding a publication to be obscene under proper instructions carry any weight at all?"

336 F.Supp. at 1376.

In *U.S. v. A Motion Picture Film*, 404 F.2d 196 (2nd Cir. 1968), Chief Judge Lumbard, in his dissenting opinion, stated, "[T]he majority would take away from the jury the power to pass on these not too difficult and complicated questions by saying that obscenity is 'an issue of constitutional law' rather than an issue of fact with respect to which the jury's finding has its usual conclusive effect." 404 F.2d at 203, 204.

This Court, in *Miller*, stated that the standards of precisely what appeals to the prurient interest or is patently offensive are essentially questions of fact. "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of this community, guided always by limiting instructions on the law" _____ U.S. _____, 37 L.Ed.2d at 434. Thus,

the determination of the "contemporary community standards" is a question of fact, not of constitutional law, and, save for some constitutional infirmity in the law applied, the jury's decision, being the ultimate and binding arbitration of the fact, and application of the law thereto, is not to be overruled based on the appellate court's motion of some abstract, metaphysical amorphous "national standard". Clearly, it was never intended that the appellate courts should supersede the jury in its capacity as fact finder. And yet this has been the result of the application of "national standards". The *Miller* decision resolved this "bewildering anomaly," and returned the decision of the jury to its rightful position in obscenity cases. Obviously, within our adversary legal system, wherein juries are the traditional finders of fact, local or state standards are the only logical criteria. Application of the alternative system of national standards in the manner previously utilized, to overrule the jury's decision as to what is obscene, merely casts doubts on the value of the jury system.

Because Georgia law required the use of other standards in 1972 when Appellant was convicted, and as this has now been held to be constitutionally permissible under the First Amendment, in the *Miller* case, the decision of the jury finding "Carnal Knowledge" obscene should not be disturbed. Save for errors of constitutional magnitude in the trial and instructions, the decision of the jury in this case, applying contemporary community standards to the movie finding it obscene is a decision of fact, and should not be disturbed.

CONCLUSION

For the foregoing reasons, the decision of the court below should not be disturbed.

Respectfully submitted,

TONY H. HIGHT
Counsel for Appellee

CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, Tony H. Hight, of Counsel for the State of Georgia, Appellee in the foregoing case, certify that I have this day served a copy of the foregoing motion to dismiss or affirm upon Appellant, by depositing in the United States Post Office in Atlanta, Georgia, a copy of the same in separate envelopes addressed to: Tenche C. Cox, 1500 Candler Building, Atlanta, Georgia 30303; Louis Nizer, 477 Madison Avenue, New York, New York 10022; James Bouras, 522 Fifth Avenue, New York, New York 10036, attorneys for Appellant, with sufficient postage affixed thereto.

This _____ day of February, 1974.

TONY H. HIGHT
Counsel for Appellee